IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 406 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MS.JUSTICE H.N.DEVANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

RAKESH GORDHANBHAI PATEL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
THROUGH JAIL for Appellant(s) : 1,MS SADHANA SAGAR, Appointed by Legal Aid
MR. R.C.KODEKAR, APP for Respondent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 26.09.2007 / 5.10.2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this Appeal, filed under Section 374 of the Code of Criminal Procedure ("the Code" for short) is to the correctness of the judgment and order dated 1.4.1999 rendered in Sessions Case No. 254 of 1997 by the learned Additional Sessions Judge, Surat, by which the sole Appellant ("the Accused" for short) has been convicted for commission of the offences punishable under Sections 302 and 498A of the Indian Penal Code ("IPC" for short), and sentenced to suffer imprisonment for life and fine of Rs.2000/- i.d. simple imprisonment of 6 months for the offence punishable under Section 302 IPC and RI for 2 years and fine of Rs.500/- id SI of 2 months for the offence punishable under Section 498A IPC. It is also ordered that both the sentences shall run concurrently.

2. The prosecution case as disclosed from the FIR and unfolded during trial is as under:

2.1 As per the allegations made by PW-1 Shantaben Lallubhai, her elder daughter Kamlaben married the Accused prior to five years of the incident. Since five years, prior thereto, her

daughter Kamlaben was living with one Rakesh Gordhanbhai Patel, who was residing near their hut, as his wife. She had two sons, namely Suresh, aged 3 years and Kirit, aged 9 months. Her son-in-law Rakesh used to search for diamonds in the gutter and earn his livelihood by selling the same. Rakesh's parents were residing at Gotalvadi in Surat. She has further stated that Rakesh and her daughter, along with their children, were residing near their hut in their make-shift hut. Rakesh had the habit of drinking liquor and, off and on, he used to quarrel with his daughter Kamlaben and beat her. However, as she had two children, she used to believe that he would mend his ways, and so, she had never complained to them. She has further stated that on Monday, 9.6.1997, in the morning at 9 0' Clock, she had gone to attend her work and in the afternoon, at about 1 0' Clock, her son-in-law Rakesh and her younger daughter Radhaben had come to her place of work and told her to come home as Kamlaben had caught fire. At that time, she asked them as to how she had caught fire, whereupon, they had informed her that she had poured kerosene on herself and set herself ablaze. Upon their saying so, she had immediately come to her house and upon going near Kamla's hut, she had seen that Kamlaben had sustained burns all over her body. At that time, she was not speaking. Thereafter, they had called an ambulance and taken Kamlaben to the New Civil Hospital for treatment. On reaching there, she had asked her as to what had

happened, whereupon she had told her that her husband was severely beating her after consuming liquor and was harassing her. Therefore, she had poured kerosene on herself and set herself on fire. Thereafter, Kamlaben had been admitted to the Burns Ward and she had remained there in the hospital to take care of her, and that, on the previous day, on 12.6.1997, in the afternoon at about 2 0' Clock, as she had stayed in the hospital continuously for about four days, she had gone home and her son-in-law Rakesh and her son Naran and another neighbour Dhoju Rabadia were there with her daughter at the hospital. She has stated that on the previous night, she, her husband and children had taken their meals and gone to sleep, after which at about 2 0' Clock, her son Naran and son-in-law Rakesh had come home and informed them that Kamlaben had expired at midnight, at about 12:15 hrs., and that Kamlaben's dead body was kept in the postmortem room in the hospital. Accordingly, she had lodged the complaint that her son-in-law Rakesh used to consume liquor and beat her daughter Kamlaben and harass her, and as such, on 9.6.1997, she had poured kerosene on her body and set herself on fire, and had expired during the course of treatment in the Government Hospital.

2.2 Complaint for the aforesaid incident was lodged by PW-1 Shantaben Lallubhai on 13.6.1997 against the Accused at Surat Railway Police Station, which was recorded by PW-20

Bharatsingh Baburao Patil, PSI of Surat Railway Police Station. He, registered the offence against the Accused and started investigation. During the course of investigation, he has also collected the janvajog entry, which was registered by PW-22, Damabhai Amarsinh Parmar, Head Constable, on 9.6.1997. He held the inquest on the dead body of the deceased and sent the dead body for autopsy. He has arrested the Accused on the same day. He thereafter recorded the statement of the witnesses and thereafter handed over the further investigation to PW-25 Fakruddin Mohammedbhai Bata.

2.3 As, sufficient incriminating evidence was found against the Accused for commission of the offences punishable under Sections 306 and 498A IPC, he filed charge sheet against the Accused for commission of the offence punishable under Sections 306 and 498A IPC, in the court of learned JMFC (Railway) Surat.

2.4 As the offences under Sections 306 and 498A IPC are exclusively triable by the Court of Sessions, the leaned JMFC committed the case to the Court of Sessions, at Surat.

2.5 The learned Additional Sessions Judge, Surat, to whom the case was made over for trial, framed charge against the Accused for commission of the offence punishable under Sections 306 and 498A IPC. The charge was read over and explained to the accused. The Accused pleaded not guilty to the charge and claimed to be

tried. Therefore, he was put to trial by the learned Additional Sessions Judge, Surat in Sessions Case No. 254 of 1997.

2.6 In order to bring home the charge levelled against the Accused, the prosecution has examined as many as 25 witnesses and relied upon their oral testimony, the details of which have been narrated in paragraph 5 of the impugned judgment and order. They are as under:

PW No.	Name and Status	Exhibit	Page No.
1	Shantaban Lallubhai, Mother of the deceased.	13	60
2	Lallubhai Babubhai Gosai, Father of the deceased.	15	66
3	Jariyatsingh Rajpatsingh Thakur	18	
4	Kanaiyalal Laxmanbhai Pawar, Panch witness	21	74
5	Dr. Sejalben Chandrakantbhai Reshambala, Medical Officer	24	77
6	Manjuben Vijaybhai Rathod, Neighbour of the deceased.	25	75
7	Vijaybhai Kachrabhai, Independent witness	26	81
8	Devkaben Babubhai, Independent witness	27	83
9	Pushpaben Naranbhai, Bhabhi of the deceased.	28	85
10	Narayan Lallubhai, Brother of the deceased.	29	89

PW No.	Name and Status	Exhibit	Page No.
11	Radhaben Lallubhai, Sister of the deceased.	30	89
12	Dr. Mohammed @ Eshaq Mohammed Sheikh, Expert evidence.	33	93
13	Manjulaben Ishwarbhai, Independent witness	35	104
14	Nareshbhai Lallubhai, Brother of the deceased.	36	106
15	Ishwarbhai Ranchodbhai, Independent witness	37	107
16	Hiralal Uttam Patil	38	
17	Babubhai Punabhai, Head Constable	40	111
18	Sudhakar Parasram, PSO Mahidharpura Police Station	44	115
19	Arjunsingh Roopsingh, P.S.O. Surat Police Station	46	118
20	Bharatsingh Baburao Patil, PSI, Surat Raiwlay Police Station	52	121
21	Natvarsingh Jitsingh Gohil, PSI, Mahidharpura Police Station.	54	126
22	Damabhai Amarsingh Parmar, Head Constable, Surat Railway Police Station	56	128
23	Dr. Prashantbhai Ramniklal Bhatt, Expert Evidence.	60	132
24	Ramdas Shankarsinh Shah, Duty Constable at Civil Hospital.	62	136
25	Fakruddin Mohemmadbhai Bata, Dy. SP.	63	38

2.7 To prove the culpability of the Accused, the prosecution has also produced number of documents and relied upon the contents of the same, the details of which are mentioned in second part of paragraph 6 of the impugned judgment and order. They are as under:

Srl. No.	**Particulars**	**Exh.**
1.	Complaint.	14
2.	Inquest Panchnama.	8
3.	Panchnama of scene of offence.	39
4.	Panchnama of the body of the deceased.	22
5.	True copy of Diary Entry No. 21/97 at Surat Railway Police Station.	47
6.	True copy of Vardhy Entry No. 163 at Surat Railway Police Station.	41
7.	True copy of Diary Entry No. 21/97 at Mahidharpura Police Station.	45
8.	PM Note of deceased Kamlaben.	34
9.	DD taken by Executive Magistrate.	19
10.	Yadi by Executive Magistrate.	55
11.	Case papers prepared while admitting Kamlaben in the Hospital.	61

2.8 It may be noted that, after the evidence of the prosecution witnesses was over, learned APP submitted an Application exh. 66, inter alia contending that, from the evidence of Doctor, it revealed that the Accused has committed offence punishable under Section 302,

therefore, in the interest of justice, initial charge framed against the Accused for commission of the offence under Section 306 IPC may be altered into 302 IPC.

2.9 The said Application was opposed by the Accused inter alia submitting that, the Application was submitted with a view to delay the trial. The Accused has submitted that after the evidence of the prosecution witness was over, prosecution has no right to submit such an Application, and even in view of the inconsistent evidence of the Doctor, evidence of the prosecution witness is not believable, and therefore, it was prayed to dismiss the Application.

2.10 The trial Court accepted the Application and thereby altered the charge against the Accused from 306 IPC to 302 IPC by passing a reasoned and detailed order. The said order was not challenged by the Accused in the higher forum.

2.11 After altering the charge from 306 IPC to 302 IPC, the trial Court explained to the Accused, the circumstances appearing against him and recorded his further statement under Section 313 of the Code. In his further statement, the Accused denied the case of the prosecution in its entirety. He has stated that a false case has been filed against him. However, he has, neither led any evidence nor examined any

witness in support of his defence.

2.12 On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial Court came to the conclusion that the prosecution has successfully established the complicity of the Accused for committing murder of his wife, as she died a homicidal death. It was also held that though all the witnesses have turned hostile, prosecution has established the guilt of the Accused from the evidence of the dying declaration made by the deceased to the Doctor, who first treated her, and to Police Officer, who has recorded the vardhy. The prosecution has also established that the deceased was subjected to mental and physical cruelty at the hands of the Accused. Therefore, the prosecution has established that the Accused has committed the murder of his wife. It was also held by the trial Court that the deceased was mentally and physically harassed at the hands of the Accused. On the aforesaid findings, the trial Court held that the complicity of the Accused for murdering his wife as well as causing mental and physical cruelty to her has been duly established, and consequently, the trial Court convicted the Accused for the offences punishable under Sections 302 IPC and 498A IPC, and imposed the sentences, to which the reference is made in earlier paragraph of this judgment, which has given rise to the instant Appeal at the instance of the Accused.

3. Ms. Sadhna Sagar, learned advocate of the Accused, appointed by legal aid committee, has submitted that there is no eye witness to the incident. The case of the prosecution, is based on two sets of dying declarations made by the deceased, one of which is made before PW-23 Dr. Prashant Ramniklal Bhatt to the effect that her husband had sprinkled kerosene on her and set her ablaze. Similar dying declaration was also made by the deceased before PW-24 Ramdas Shankarsinh Shah, who was on duty at Civil Hospital. On the basis of the said dying declaration, entry in the vardhy was recorded at Mahidharpura Police Station, which was conveyed by PW-24 Ramdas Shankarsinh Shah, duty Constable at Civil Hospital. So far as second set of dying declaration is concerned, which the deceased had stated before PW-5 Dr. Sejalben Chandrakantbhai Reshamvala, it is to the effect that the deceased had committed suicide by sprinkling kerosene on herself and setting herself ablaze. Similar version is also given by her in the dying declaration which was recorded by PW-3 Jariyatsingh Rajpatsingh Thakur, Executive Magistrate. She has further submitted that the dying declarations, which were made by the deceased, were before the independent persons, are in two sets. Therefore, it is not coming on record, which dying declaration is correct.

3.1 It is also contended by her that initially the charge sheet was filed and the

charge was also famed against the Accused for commission of the offence punishable under Sections 306 and 498A IPC. At the end of trial, before recording further statement, charge was altered from 306 to 302 IPC. Therefore benefit of doubt must go to the Accused. However, the learned Judge has recorded the conviction against the Accused for commission of the offence punishable under Section 302 IPC without affording any reasonable opportunity to defend his case. She has also emphasized that even if we accept the second set of dying declaration, in that case also it has to be held that the deceased had committed suicide. Committing suicide itself cannot be punishable for the offence of abetment to suicide punishable under Section 306 of the IPC unless there is an evidence to the effect that the deceased was harassed by the husband to such an extent that the harassment was incessant, persistent and unbearable in nature which could have led the deceased to take such an extreme step of committing suicide. Even if, in case we accept the second set of dying declaration, she has stated that, because her husband used to consume liquor and beat her, therefore, she has committed suicide. It is also pointed out that, so far as complaint lodged by PW-1 Shantaben Lallubhai is concerned, which is lodged for commission of the offence punishable under Section 306 IPC, however she has not supported the complaint and resiled from the statement made in the complaint, therefore, offences

punishable under Sections 306 and 498A IPC are also not made out. Therefore, according to her, the impugned judgment and order passed against the Accused, convicting him for the offence punishable under Sections 302 and 498A IPC deserves to be quashed and set aside by allowing this Appeal and thereby acquitting the Accused of the offences with which he was charged.

3.2 Alternatively, it is also submitted by her that the Accused has already undergone 7 ½ years imprisonment, therefore, even if this Court comes to the conclusion that the offence under Section 306 is made out, then in that case, the period undergone by the Accused may be treated as substantive sentence for the offence punishable under Section 306 IPC, as the maximum punishment for the offence punishable under Section 306 IPC is RI of 10 years. She, therefore urged to pass appropriate orders by altering the conviction recorded under Section 302 IPC to 306 IPC and accordingly period undergone by the Accused may be treated as substantive sentence. She, therefore, urged to pass appropriate order in this regard.

4. In counter submission, Mr. R.C.Kodekar, learned APP for the Respondent – State of Gujarat has submitted that there is ample evidence on record to connect the Accused with the crime in question. Referring to the evidence of dying declarations, it is submitted by him that the first dying declaration is recorded by PW-23 Dr.

Prashant Ramniklal Bhatt before whom the deceased had given the statement that her husband had sprinkled kerosene on her and set her ablaze. According to him, so far as the second set of dying declaration is concerned, which the deceased had stated before PW-5 Dr. Sejalben Chandrakant Reshamvala and PW-3 Jariyatsingh Rajpatsingh Thakur, possibility cannot be ruled out that the deceased must have been tutored subsequently by her family members, and that is the reason that the family members of the deceased have not supported the prosecution case. Therefore, no reliance can be placed on the second set of dying declaration.

4.1 It is settled principle of law that so far as dying declaration is concerned, normally the first version given by the deceased in conscious state of mind, should be accepted. It is also highlighted by him that the complicity of the Accused for commission of the offence of committing murder of his wife is duly established, therefore, same should not be interfered by this Court. It is, therefore, submitted that the Appeal being devoid of merits, may be dismissed by confirming the impugned judgment and order. He, therefore, urged to dismiss the Appeal.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete

and comprehensive appreciation of all vital features of the case and the entire evidence on record, which is read and re-read by the learned advocates of the parties with reference to broad and reasonable probabilities of the case. This Court has examined the entire evidence on record for itself independently of the learned Judge of the trial Court and considered the arguments advanced on behalf of the Accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

6. There is no dispute to the fact that the deceased Kamlaben died an unnatural death due to burn injuries. To prove this fact, the prosecution has examined and relied upon the oral testimony of PW-12 Dr. Mohammad Iliyas Eshak Mohammad Sheikh, Assistant Professor, New Civil Hospital, Surat, at exh. 33. He had testified that on 13.6.1997 at 3:00 pm deceased Kamlaben was brought to him for performing postmortem. He had performed the postmortem on the dead body of the deceased and thereafter issued PM report, which is on record at exh. 34. On a conjoint reading of oral testimony of PW-12 and autopsy report at exh. 34, it is seen that the cause of death of the deceased Kamlaben was due to shock and septicemia, as a result of the extensive burns. Therefore, it has to be held that the deceased Kamlaben had died an unnatural death.

7. It may be noted that the prosecution has filed charge sheet against the Accused for commission of the offences punishable under Sections 306 and 498A IPC, meaning thereby, when the charge sheet was filed, the case of the prosecution was that the deceased died a suicidal death. However, at the end of the trial before recording the further statement, on the basis of the Application submitted by the learned APP, charge was altered from 306 to 302 IPC in view of the evidence of PW-23 Dr. Prashant Ramniklal Bhatt and evidence of PW-24 – Ramdas Shankarsinh Shah, before whom the deceased had made a statement with regard to her death.

8. In the instant case, there is no eye witness. PW-1 Shantaben Lallubhai, who lodged the complaint, which is on record at exh. 14, which is for suicidal death abetted by the Accused punishable under Section 306 as well as 498A IPC, has not supported the contents of the complaint nor PW-2 Lallubhai Babubhai Gosai has supported the prosecution case even with regard to abetment made by the Accused to the deceased to commit suicide. Similarly, most of the witnesses have turned hostile. Therefore, as observed earlier, entire case is based on the evidence of the two sets of dying declarations, which is required to be discussed in extenso.

9. Before appreciating the evidence of the witnesses, before whom the dying declarations were made by the deceased, it would be relevant

to notice the law relating to dying declaration. In case of Paniben v/s State of Gujarat, 1993 (2) GLR, 985, the Supreme Court has formulated the principle laid down in several judgments of the Supreme Court governing dying declarations. A Division Bench of this Court in the case of State of Gujarat v. Maniben, 2001 (2) GLR 1749, has very succinctly stated the law in this regard as under:

"Section 32(1) of the Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence or that unless evidence is tested by cross-examination, it is not credit-worthy. Under section 32(1) when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased called the dying declaration, falls in that category provided it has been made in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. If there are more than one dying declarations, then the Court has to scrutinize all the dying declarations to find out if each of them passes the test of being trustworthy. The Court must further find out whether

different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause or circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at that point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Court, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any

embellishment such a dying declaration by itself can be sufficient for recording conviction without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Court has to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The dying declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncement in order to answer the question whether the dying declaration is true: (1) Was the victim in a position to identify the assailant/s? (2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities? and (3) Whether any material part is proved to be false by other reliable evidence?"

10. In the light of the principles laid down in the above-referred decisions, we may now proceed to consider the evidence on record relating to dying declarations and examine each of the dying

declarations independently to ascertain the veracity of each declaration.

11. In this connection we shall first advert to the oral testimony of PW-23 Dr. Prashant Ramniklal Bhatt, Medical Officer, Civil Hospital, at exh. 60. He has testified that the deceased Kamlaben was brought before him on 9.6.2007 at 2:15 for treatment. He had examined the deceased and asked the reasons for her burn injuries. Deceased had stated before him that at 1:00 pm on that day, her husband had poured kerosene on her and set her ablaze. He had also testified that the deceased had sustained burn injuries to the extent of 80% all over her body. He had thereafter shifted her to female burns ward for further treatment. He had also prepared the case papers, which is on record at exh. 61. On a conjoint reading of oral testimony of Dr. Prashant Ramniklal Bhatt and the case papers at exh. 61, it is seen that the Dr. Prashant Ramniklal Bhatt had noted the history given by the patient, wherein it is stated that her husband burnt her on that day at about 1:00 pm at her home by pouring kerosene.

12. The prosecution has thereafter examined and relied upon the oral testimony of PW-24 Ramdas Shankarsinh Shah at exh. 62. He has inter alia testified that on 9.6.1997 when he was on duty at Civil Hospital, Surat, at 2:10 PM, Kamlaben was brought to Civil Hospital, Surat in burnt condition. He had asked Kamlaben as to the cause of burn injuries received by her.

Kamlaben had stated before him that at 12:30 PM a quarrel took place between herself and her husband, as a result of the said quarrel, her husband sprinkled kerosene on her and thereafter set her ablaze. He had therefore conveyed the said message to Mahidharpura Police Station. The extract of the vardhy is produced at exh. 45. On a conjoint reading of oral testimony of PW-24 and the extract of vardhy at exh. 45, it is seen that the deceased had stated before PW-24 that on 9.6.1997 at 12:30 pm there was a quarrel between herself and her husband and as a result thereof her husband sprinkled kerosene on her and set her ablaze.

13. On overall reappraisal of the evidence of PW-23 Dr. Prashant Ramniklal Bhatt and PW-24 Ramdas Shankarsinh Shah, it is seen that the deceased Kamlaben had made a declaration about the cause of her death, wherein she had stated that her husband had sprinkled kerosene on her and thereafter set her ablaze. This is the first set of dying declaration.

14. Now we shall examine the second set of dying declaration. In the second set of dying declaration, there is evidence of PW-5 Dr. Sejalben Chandrakantbhai Reshamvala, Resident Doctor in Surgery Department of Civil Hospital, Surat, at exh. 24. She has testified that on 9.6.1997 she was on duty in Surgery Department. S.M.Pandya is the Head of Surgery Department. One patient named Kamlaben was brought to burns ward for treatment. She was examined by all the

Doctors and she had also taken part in the said examination. She had also given treatment to her. There was 90-95% burn injury sustained by the patient all over her body. Kamlaben was able to speak. She was in conscious state. Kamlaben died on 13.9.1997 and from the date of the admission, she was in complete conscious condition. She has further testified that Kamlaben had stated before her that she herself had received burn injuries. She had also stated that the said statement made by Kamlaben was recorded in the case papers.

15. The prosecution has thereafter examined and relied upon the oral testimony of PW-3 Jariyatsingh Rajpatsingh Thakur, Executive Magistrate at exh. 18. He has inter alia, testified that on 9.6.1997 he was on duty as Deputy Mamlatdar and Executive Magistrate in the office of Mamlatdar Office, Surat. On that day at 4 0' Clock he received a yadi from Mahidharpura Police Station for recording dying declaration of Kamlaben. He, therefore, went to Burns Ward of Civil Hospital. Thereafter he inquired from the Nurse and went to the cot of Kamlaben. Thereafter he had started recording her dying declaration. Prior to that he also introduced himself and after preliminary inquiry, he had asked her about the cause of burn injuries. Kamlaben had stated before him that her husband frequently used to beat her after consuming liquor. Therefore, she set herself ablaze by sprinkling kerosene on her.

He had also testified about the persons who were present at the time when the incident took place. Kamlaben had stated that neighbours were present at the time when the incident took place. Kamlaben had also stated before him that she had a quarrel with her husband. It is also testified by him that the statement which was recorded by him was also read over to Kamlaben and thereafter he had taken her thumb impression on the said statement and he had also put his signature on it. The said statement is on record at exh. 19. On a conjoint reading of oral testimony of PW-3, Jariyatsingh Rajpatsingh Thakur, and the written dying declaration at exh. 19, it is seen that deceased made a declaration before him that on 9.6.1997 at 12:30 pm her husband had beaten her after consuming liquor, therefore, she set herself ablaze by sprinkling kerosene on her. On reappraisal of the evidence of these two witnesses, it is seen that the deceased made a declaration about the death to the effect that she has attempted to commit suicide as her husband used to beat her after consuming alcohol.

16. On overall reappraisal of the four dying declarations, two from each sets, it is seen that all the four witnesses are independent witnesses. The prosecution has relied upon their oral testimony and, therefore, cited them as witnesses. It is not the case of the prosecution that so far as second set of dying declaration is concerned, witnesses before whom

the set of dying declaration was made, have been won over by the Accused and they have not deposed the correct version made by the deceased before the Court.

17. In view of the aforesaid fact situation, when the prosecution has come with two sets of dying declarations; one which leads to the conclusion that the deceased died a homicidal death as a result of her being set ablaze by her husband, and the second set of dying declaration leads to the conclusion that she died a suicidal death because she poured kerosene on herself and set herself ablaze and all the dying declarations are before independent persons, it would be difficult to come to the conclusion that which set of dying declaration is correct. Therefore, benefit of doubt must be given to the Accused for the offence punishable under Section 302 IPC. Therefore, it has to be held that the deceased died a suicidal death. Therefore, conviction recorded against the Accused for commission of the offence punishable under Section 302 IPC is required to be altered into conviction under Section 306 IPC.

18. So far as the offences punishable under Sections 306 and 498A IPC are concerned, the prosecution has examined all the witnesses, including the mother and father of the deceased, who have not supported the prosecution case. However, the fact remains that on perusal of the complaint given by PW-1 Shantaben Lallubhai, which is on record at exh. 14, it is seen that the deceased

had died because of mental and physical cruelty meted out to her by her husband, which was so incessant, persistent and unbearable nature, which could have led her to take such an extreme step of putting her life to an end by setting herself ablaze by pouring kerosene on her. Therefore, according to us, the prosecution has established the offence against the Accused punishable under Sections 306 and 498A IPC.

19. Now, this takes us to decide the quantum of punishment to be imposed upon the Accused.

20. Maximum punishment for commission of the offence punishable under Section 306 is RI of 10 years. Looking to the nature of the crime which the Accused has committed, we propose to impose maximum punishment of RI of 10 years and fine of Rs.2000/- id of payment of fine, SI for 6 months. The Appeal, therefore, deserves to be allowed in part by altering the conviction from Section 302 IPC to Section 306 IPC.

21. Seen in the above context, while confirming the order of conviction and sentence recorded against the Accused for commission of the offence punishable under Section 498A IPC, we alter the order of conviction recorded against the Accused for commission of the offence punishable under Section 302 IPC to Section 306 IPC and the Accused is ordered to undergo RI for 10 years and fine of Rs.2000/- i.d. of payment of fine SI of 6 months for the offence punishable under Section 306 IPC. So far as the

sentence recorded under Section 498A IPC is concerned, it is maintained.

22. For the foregoing reasons, the Appeal succeeds in part and accordingly it is partly allowed. The order of conviction recorded under Section 302 IPC is altered to conviction under Section 306 IPC and the Accused is sentenced to suffer RI of 10 years and fine of Rs.2000/- i.d. of payment of fine SI for 6 months. So far as the order of conviction and sentence for the offence under Section 498A IPC is concerned, it is maintained. It is also ordered that both the sentences shall run concurrently.

23. It has been reported by Mr. R.C.Kodekar, learned APP for the Respondent State of Gujarat that the Accused has been released on regular bail after undergoing sentence of round about 6 years and 8 months, during the pencency of the Appeal vide order dated 23.4.2004 recorded in Criminal Misc. Application No. 3099 of 2004 by a Division Bench of this Court. The Accused is therefore, ordered to surrender before the jail authorities to serve out the remaining period of sentence as imposed by this Court, within a period of six weeks hereof, failing which learned Additional Sessions Judge, Surat shall issue non-bailable warrant to procure his presence and then to send him to jail, to serve out the remaining period of sentence.

(A.M.Kapadia,J)

(H.N.Devani,J)

Jayanti*-